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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 250

TEMPLE OF LIGHT, a Michigan Ecclesiastical Corporation, and O. JAMES CREWS,

Petitioners,

vs.

BOSTON-EDISON PROTECTIVE ASSOCIATION, a Michigan Corporation, and SARAH P. BURGESS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY R. BISHOP,
Counsel for Respondents,
2951 Penobscot Bldg.,
Detroit 26, Michigan.

ROBERT, INC., 2420 FOURTH ST. AT HENRY, DETROIT, MICH.

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Defendants, Appellants and Petitioners,
vs.
BOSTON-EDISON PROTECTIVE ASSOCIATION, a Michigan Corporation, and SARAH P. BURGESS,
Plaintiffs, Appellees and Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONCISE STATEMENT OF CASE

A complete understanding of the case requires that Petitioners' statement be supplemented as follows:

The church services of the Temple of Light are devoted both to spiritual matters and to astrology (78, 83). The

pastor, defendant O. James Crews, who founded the church, engages in the activity of casting horoscopes, and he estimated that up to the date of trial he had read the horoscopes of about twelve hundred (1200) persons at the restricted premises (69). These readings are astrological in nature and concern the foretelling of future events (68). They involve the preparation of charts based upon some calculations concerning birth dates, the latitude and longitude of the earth and the position of the planets (67-68). Advice was given on everything including stock market indications (74). While members of the church were not charged for these services, non-members were asked to donate to the building fund, and these "donations" have usually ranged between $5.00 and $150.00 (69). Mr. Crews holds himself out as the "Messenger of Light" (66-67) and the "Voice of Knowledge" (59). Prior to the decree, any member of the public was permitted and invited to frequent the premises for a horoscope reading (70-71). Appointments for these readings were arranged by Mr. Crew's secretary who was in daily attendance at the premises (85). Further details as to the origin and nature of the Temple of Light and the activities of the church and its pastor, Mr. Crews, may be found in the opinion of the trial court (91) and in the opinion of the Supreme Court of Michigan (105). Prior to forming the Temple of Light, Mr. Crews had been head of an advisory league, which, according to his testimony, was brought to an end on April Fool's Day, 1931 for practicing law illegally (57).

From the commencement of this suit in the trial court on November 26, 1941 (R. 1) until the entry of the decree of the Supreme Court of Michigan on April 3, 1945 (R. 108) the Petitioners did not at any time contend that there was a constitutional issue involved. They did not then apply to this court for review of the decree of the Supreme

Court of Michigan. On January 29, 1947 (and not 1945 as erroneously stated on page 14 of Petitioners' brief) the Petitioners petitioned the Supreme Court of Michigan to grant a rehearing of the case, claiming among other things that the decree deprived them of the federal constitutional rights which they here assert (R. 111, 117). On April 9, 1947, the Supreme Court of Michigan entered an order denying that petition (R. 165). Again Petitioners did not seek review by this court. On October 29, 1949, Petitioners took matters in their own hands and deliberately violated the decree of the Supreme Court of Michigan by using the restricted premises for church services, reading horoscopes, putting on a vaudeville show attended by a large gathering which purchased admission tickets and selling lunches to the gathering, which facts appear in the affidavit of Ralph Seidenbecker and are not denied by Petitioners (R. 180-183). To forestall proceedings for contempt the Petitioners again petitioned the Supreme Court of Michigan to change its decree and set aside the injunction, again claiming that the decree deprived them of their federal constitutional rights (R. 166-173). The Supreme Court of Michigan on May 18, 1950 denied the petition (184) as it had done on April 9, 1947 (165) and Petitioners now for the first time seek review in this court.

SUMMARY OF ARGUMENT

The Plaintiffs and Appellees contend that the petition for writ of certiorari should be denied because—

1. It was not timely filed and comes as an afterthought.

2. It does not present any federal question of substance.

ARGUMENT

1. The Petition for Writ of Certiorari Was Not Timely Filed and Comes as an Afterthought.

It has been shown in the Concise Statement of the Case that following the entry of the decree of the Supreme Court of Michigan on April 3, 1945, the Petitioners petitioned the Supreme Court of Michigan to grant a rehearing upon the ground among others that the decree was contrary to the same federal constitutional provisions which they rely upon in this proceeding (R. 111, 117). Upon denial of their petition by order of the Supreme Court of Michigan entered April 9, 1947 (R. 165), the Petitioners did not apply to this court for review. Under these circumstances, the Petitioners should not be permitted at this late date to reopen the case.

2. The Petition Does Not Present Any Substantial Federal Question.

It is well settled by the decisions of the Supreme Court of Michigan that building restrictions are private property of value. They cannot even be taken under the power of eminent domain without compensation. *Allen vs. City of Detroit,* 167 Mich. 464.

In *Johnstone vs. Detroit, etc., R. Co.,* 245 Mich. 66, 77, the Supreme Court of Michigan stated:

> "Other courts have designated the right created by building restrictions as a negative easement, recipro-

> cal negative easement, property right, equitable interest in the nature of, or analogous to, an easement or negative easement, and otherwise. Whatever the name, all American authorities we have been able to discover, which have attempted definite statement of the effect of building restrictions adopted in furtherance of a general plan, hold that they constitute equitable interests or property rights in each lot for the benefit of and appurtenant to each other lot covered by the same restrictions, at least when the instrument creating them evidences the purpose that they shall run with the land and not be purely personal."

The court further said at page 74 as follows:

> "Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate. This court has expressly recognized that the right of privacy for homes is a valuable right."

In *11 American Jurisprudence,* at page 1145, under the topic *Constitutional Law,* it is said:

> "The right of property is a fundamental, natural, inherent, and inalienable right. It is not *ex gratia* from the legislature, but *ex debito* from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them. It is sometimes characterized judicially as a sacred right, the protection of which is one of the most important objects of government."

But the same Constitution which thus protects the Plaintiffs and Appellees in the enjoyment of the privacy of their homes is looked to by the Petitioners to justify an invasion of those homes under the guise of the exercise of religious freedom. It will be noted that the Petitioners in common with others purchased their property burdened

with a restriction or reciprocal covenant intended to fix and preserve the properties in the subdivision as places of private abode. Having purchased that kind of property, the Petitioners surely cannot be heard to say that enforcement of the decree will deny to them any right which is entitled to protection under the Constitution.

This court has never held and it does not seem likely that it will ever hold that freedom of religion is absolute as contended by the Petitioners. Could it be argued successfully that a newspaper establishment may operate without restraint in this subdivision merely because the Constitution guarantees freedom of the press? Or, could it be argued successfully that a house in this restricted subdivision may be turned into an auditorium or public lecture hall upon the ground that the Constitution guarantees freedom of speech and of assembly? The answer to these questions seems at once obvious. The Constitution also secures people in their right to carry on trade and commerce generally.

In *11 American Jurisprudence,* page 1147, it is said:

> "The right to earn a livelihood by following the ordinary occupations of life is protected by the Constitution; such protection is particularly found in the guaranties of the Fourteenth Amendment. It has been said that the preservation of such right is the principal purpose of the Constitution itself and is of the very essence of the personal freedom and opportunity that it was the purpose of the Fourteenth Amendment to secure. The right is fundamental, natural, inherent, and inalienable, and is one of the most sacred and most valuable rights of a citizen. A person's business, occupation, or calling is 'property' within the meaning of the Constitutional provisions as to due process of law and is also included in the right to liberty and pursuit of happiness."

Does it follow from the foregoing that this subdivision will not be granted protection against the inroads of business places? The answer seems clearly "No". The same answer must apply in the instant case where the Petitioners seek to carry on church services, vaudeville shows, public horoscope readings or other activities thought by them to have religious significance.

The contention made by the Petitioners in this proceeding is not supported by any of the cases cited in their brief. *Sipes vs. McGhee* and *Shelley vs. Kraemer* decided that the State, through its courts, could not enforce a restriction which discriminated against persons on account of their color thereby denying them the equal protection of the laws. But the restriction which is here enforced by the decree of the Supreme Court of Michigan does not discriminate against the Petitioners on account of their color, their religion, their race, their politics, their business, or in any other respect. The restriction as enforced by the decree merely means that all uses not ordinarily carried on in a place of abode should be excluded from the subdivision, whether such uses happen to involve religious activities or not, and if they do, regardless of creed or denomination. Such a restriction is not in any sense discriminatory.

The other cases cited by the Petitioners in support of their constitutional theory have to do with the upholding of religious freedom as against statutes or ordinances enacted under the police power of the State. No case has been cited which would indicate that this court has decided or is likely to decide that churches should be allowed to establish themselves in residential subdivisions contrary to private restrictive covenants. The concept of religious freedom and due process of law does not call

for such a result at the expense of those who love their homes, and it is a fallacy to argue that it does.

Religious practices and activities take many forms and cover a wide range and, according to the defendants' tenets, embrace the practice of astrology and casting horoscopes. A church is just as inconsistent with restrictive residential covenants as a hospital, library, public lecture hall, newspaper establishment, etc. The petition merely gets down to this, that the court is asked in one sweep to nullify the effect of all building and use covenants.

The Petitioners earnestly profess sincere religious convictions, and yet for some reason they seem unable to respect the rights of the people in this subdivision to enjoy the privacy of their homes. The Petitioner, Mr. Crews, is not prevented from using the property for private devotions or other activities such as would ordinarily be expected to be found in the home of a pastor. On the other hand, when it comes to carrying on practices and activities, whether religious or otherwise, which are inconsistent with the use of the property as a private home, it is not a denial of religious freedom or due process of law to require Petitioners to follow the example of other churches and carry on those activities outside of the restricted subdivision.

RELIEF

Inasmuch as the petition for writ of certiorari does not present any substantial federal question and was not timely filed, it should be denied.

Respectfully submitted,

HENRY R. BISHOP,
Attorney for Plaintiffs,
Appellees and Respondents.

Dated: October 5, 1950.